

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Submitted on Briefs September 21, 2009

**AMBROSE C. BURNETT, JR. v. AMERICA'S COLLECTIBLES  
NETWORK, INC. D/B/A JEWELRY TELEVISION**

**Appeal from the Circuit Court for Knox County  
No. 1-477-07 Dale C. Workman, Judge**

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**No. E2009-00591-COA-R3-CV - FILED FEBRUARY 25, 2010**

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In this action for retaliatory discharge, the plaintiff/employee brought suit under both the common law and the Tennessee Public Protection Act, Tenn. Code Ann. §50-1-304(b), claiming that the defendant/employer had terminated the plaintiff's employment in retaliation for the act of reporting a supervisor's misappropriation of company materials and employees' time. The defendant claimed that the plaintiff was legitimately terminated for insubordination. The trial court granted the defendant's motion for summary judgment. The plaintiff timely appealed. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR. J., joined.

Dennis McCarthy, Knoxville, Tennessee, for appellant, Ambrose C. Burnett, Jr.

Martin B. Bailey, Knoxville, Tennessee, for appellee, America's Collectible Networks, Inc. d/b/a Jewelry Television

**OPINION**

**I. BACKGROUND**

Ambrose C. Burnett worked in the Maintenance Department and as a certified generator technician for America's Collectibles Network, Inc. ("ACN"), also known as Jewelry Television, from July 6, 2005, until his discharge on September 27, 2006. Mr.

Burnett claims that his employment was terminated because he reported his supervisor's repeated thefts of company property and employee time. ACN's proffered reason for terminating Mr. Burnett's employment was insubordination.

Mr. Burnett was sixty-one years old and serving as an assistant supervisor at the time of his termination. His supervisor was Darrell Kinzalow. Mr. Burnett claims that Mr. Kinzalow used ACN materials and employees to benefit his own construction business. Mr. Burnett further alleges that the employees were paid by ACN while working on Mr. Kinzalow's construction projects and that Mr. Kinzalow encouraged them to claim overtime for such work when they logged more than forty hours per week. According to Mr. Burnett, several of Mr. Kinzalow's construction projects were performed on the ACN CEO's and managers' homes. Mr. Burnett also claims that Mr. Kinzalow "padd[ed] time cards for at least one of his employees."

In July 2006, Mr. Burnett reported his suspicions regarding Mr. Kinzalow to the Facilities Manager, Scott Boone, who was Mr. Kinzalow's supervisor. In an affidavit, Mr. Boone stated that Mr. Burnett approached him with "a list of items handwritten on 3x5 notepaper that he felt were inappropriate actions by Darrell Kinzalow and should be investigated." Mr. Boone maintained that he met with a supervisor regarding the accusations but that he did not communicate them to Mr. Kinzalow. Mr. Burnett claims that in the week after his complaint to Mr. Boone, several tools reappeared in ACN's maintenance area after they had been missing for months. He also claims that Mr. Kinzalow began to "harass" him, including accusing him of taking two to four minutes over allotted break and lunch times.

ACN gave Mr. Burnett a copy of the "ACN Employee Handbook" ("Handbook") when he was hired. Section 9.3 states that "an employee who fails 'to report dishonest acts by others employed by ACN' will be subject to the company's four-step corrective action procedure: documented verbal warning, written warning, final written warning, and termination." Other pertinent offenses listed as warranting corrective action include "violation of any Company rule or policy" and "showing disrespect to a Customer or fellow employee." Among the offenses listed as warranting immediate termination are "theft or unauthorized possession of any Company or employee property," "insubordination," and "dishonesty or fraudulent conduct." Section 9.1 provides for "instances in which the seriousness of the offense justifies the omission or repetition of one or more of the steps in the procedure."

On July 28, 2006, Mr. Kinzalow gave Mr. Burnett a "Final Written Warning." The warning, as submitted to the trial record, included attached complaints of disrespectful behavior from two employees of other departments who had encountered Mr. Burnett in their work.

The form also included allegations that Mr. Burnett had made “repeated negative comments directed at and about [the] manager and other managers” and that he made “inappropriate comments of a sexual nature directed at or about employees.” This was the first official warning or disciplinary action taken against Mr. Burnett.

On the same day he gave the warning to Mr. Burnett, Mr. Kinzalow completed a periodic evaluation of Mr. Burnett’s performance, recommending a 2% salary increase, based on a sliding scale. Mr. Burnett earned a numerical score between 61 and 70. A top score of 91-100 would have earned him a 5% raise. On a scale of 1-10, Mr. Burnett’s mid- to low-end ratings included a “5” on team work, “6” on quality of work, “4” on initiative, “6” on policies/procedures compliance, “5” on customer service awareness, and “5” on ACN growth/success. The comments under each item repeatedly noted that Mr. Burnett made negative comments about the work he was assigned and showed an attitude of insubordination. Under Customer Service Awareness, the comments stated:

Again employee makes negative comments about the work he is performing, tells managers that they will have to wait for him to “get there when I (he) can” rather than let them know that he will be there as soon as possible. Requests are forgotten or otherwise do not get completed.

In his overall comments, Mr. Kinzalow stated: “If the negative comments, insubordination, and inappropriate comments were to cease and the employee made a concerted effort to make a nice work environment for himself, co-workers and managers, this employee would be a great asset to Jewelry Television.”

Mr. Burnett appealed the warning per Section 9.4 of the Handbook a week after he received it. ACN then reduced Mr. Burnett’s first “Final Written Warning” to a “Written Warning” in a stated attempt “to give Ambrose an opportunity to correct his behavior.” Mr. Burnett testified that at about this time, he “began to suspect that Kinzalow was setting him up to be fired.” On August 25, 2006, Mr. Burnett complained to Natalyn Webster in Human Resources regarding Mr. Kinzalow’s suspected theft and favoritism.

Five days later, Mr. Kinzalow met with his staff, including Mr. Burnett, to announce stricter company policies forbidding cell phone use at work and instructing employees to clock in and out for lunch breaks. At the meeting, Mr. Burnett refused to sign a form signifying receipt of the rule. ACN also discontinued company cell phones at this time. Mr. Burnett claims that his anxiety over breaks was increased by ACN’s action of discontinuing company cell phones because he kept track of time on his cell phone. Mr. Burnett received a second “Final Written Warning” for “work-related misconduct” the following day. That warning included attached complaints of further disrespectful behavior and of wasted work

time from two employees of another department around which Mr. Burnett had been working.

The incident that directly preceded Mr. Burnett's termination occurred on September 8, 2006. It is undisputed that Mr. Burnett had stopped taking lunch breaks. Mr. Burnett stated in his affidavit that he thought this was "the safest course to avoid being written up for taking too long on breaks." On September 8, Mr. Kinzalow informed Mr. Burnett that he would have to start taking lunch breaks because the company was required to pay overtime if an employee skipped breaks. Mr. Burnett refused, saying that he was not trying to work overtime. Mr. Burnett told Mr. Kinzalow to adjust the timesheet so that it showed a lunch break.

Two days later, Mr. Kinzalow recommended to Mr. Boone that Mr. Burnett be fired for insubordination. Mr. Boone put Mr. Burnett on administrative leave pending an investigation. ACN General Counsel, Charles A. Wagner III, learned of the situation during the week of September 18, 2006, when he received a call from Mr. Burnett's attorney. When Mr. Wagner met with Mr. Boone as part of his investigation, Mr. Boone recommended that Mr. Burnett be discharged for insubordination. ACN issued a separation notice to Mr. Burnett after a meeting that included Mr. Burnett, Ms. Webster, Mr. Boone, and counsel for both parties. The reason for termination on the notice was that Mr. Burnett "intentionally refused to clock in an [sic] out at lunch time and engaged in other activity warranting termination for cause."

Mr. Burnett appealed his termination in writing on October 3, 2006. In Mr. Burnett's appeal, he notified ACN that the people in Human Resources investigating the termination might have a conflict of interest because Mr. Kinzalow had "used company materials and tools to work on [their] homes." ACN's president and vice-president then delegated the final decision on the appeal to General Counsel Wagner. Mr. Wagner stated in an affidavit that prior to Mr. Burnett's termination, Ms. Webster was investigating the allegations against Mr. Kinzalow, and another Human Resources employee was investigating the employee misconduct charges against Mr. Burnett. Mr. Wagner stressed that "a separation between the two matters had been established to ensure that both issues would be handled in a fair and objective way."

Mr. Wagner ultimately denied Mr. Burnett's appeal. In a denial letter to Mr. Burnett, dated November 2, 2006, Mr. Wagner stated that Mr. Burnett's "inappropriate behavior, insubordination, and willful refusal to follow established rules" had led to his "warranted" termination. Mr. Wagner also stated that he had found no conflict of interest in Mr. Kinzalow's "moonlighting work for a number of employees."

Four ACN current or former employees, in addition to Mr. Burnett, submitted affidavits stating that they had seen Mr. Kinzalow use the company's materials and employee time. Tony McGaha, a current employee, said that while on company time, he had loaded and delivered sod to Mr. Kinzalow's house and delivered a Bobcat tractor between the company and Mr. Kinzalow's house. Mr. McGaha stated that ACN had paid for the sod, the Bobcat rental, and his overtime pay. Michael Sabraski, also a current employee, said that he had been paid overtime by ACN while working on Mr. Kinzalow's "private projects," and that he had seen Mr. Kinzalow use a company credit card to purchase tools he kept and materials he used in repairing a house belonging to the stepdaughter of a company employee.

Ben Denton, a former employee who voluntarily left the company, stated that he helped load sod and 2x4s onto Mr. Kinzalow's truck and then witnessed the materials in use at Mr. Kinzalow's house. Mr. Denton also stated that he had been paid overtime when he worked over forty hours in a week that included time worked for Mr. Kinzalow's private business. Robert Stevens, also a former employee, said that he had been with Mr. Kinzalow when Mr. Kinzalow bought tools at Home Depot on ACN's account. Mr. Stevens claimed that Mr. Kinzalow would usually then substitute second-hand tools for the company and keep the new tools for himself. Mr. Stevens also stated that he worked on Mr. Kinzalow's "moonlighting jobs" while being paid by ACN. These jobs included working at Mr. Kinzalow's house and at Mr. Kinzalow's ex-wife's mother's house. Mr. Stevens stated that he left ACN after Mr. Kinzalow wanted him to "cut corners" on an electrical job.

Mr. Denton and Mr. Sabraski also stated that they had each reported Mr. Kinzalow, and that immediately afterward, Mr. Kinzalow began to "harass" them for "phony violations of company policy" and subsequently issued the first disciplinary warnings that they had ever received. According to Mr. McGaha's affidavit, he submitted a statement to his supervisor regarding the "cheating" that he had seen Mr. Kinzalow commit, but his supervisor "didn't want to hear [his] complaints." Neither Mr. Denton nor Mr. Sabraski were discharged by ACN.

Mr. Burnett sued ACN for retaliatory discharge under the common law and under Tenn. Code Ann. § 50-1-304, claiming that he was retaliated against because he reported his supervisor for "stealing company materials for himself and for the benefit of third parties. . . ." Mr. Burnett sought compensatory damages for lost wages and benefits, as well as attorney's fees. ACN moved for summary judgment, claiming that Mr. Burnett failed to establish a *prima facie* case of retaliatory discharge and that Mr. Burnett was discharged for the legitimate business reason of insubordination. After a hearing, the trial court granted ACN's motion for summary judgment.

The trial court gave two reasons for its holding:

First, the Defendant has articulated insubordination as the sole reason for the termination of the employment of [Mr. Burnett]. There is no factual dispute as to whether Burnett was insubordinate, insubordination is sufficient reason for termination, and the Plaintiff failed to come forth with compelling circumstantial evidence from which a rational jury could conclude that ACN was motivated to discharge Burnett for any reason other than his insubordination. Secondly, and while the Court determines that it is a closer question, the Court holds that Burnett's complaints about the actions of Darrell Kinzalow in using ACN time and materials for the benefit of ACN officers and supervisors do not bring him within the protections of either the statutory or common-law whistleblower causes of action. The Court concludes that Burnett's complaints did not raise matters of public concern important to the public health, safety or welfare.

Mr. Burnett timely appealed.

## **II. ISSUES**

Mr. Burnett raises the following issues on appeal, which we restate slightly:

- A. Whether the trial court erred in holding that Mr. Burnett's claim did not fall within the protection of either the common law cause of action for retaliatory discharge or the Tennessee Public Protection Act because it did not raise matters of public concern important to the public health, safety, or welfare.
- B. Whether the trial court erred in holding that Mr. Burnett failed to come forth with compelling circumstantial evidence from which a rational jury could conclude that ACN was motivated to discharge Mr. Burnett for any reason other than his insubordination.

## **III. STANDARD OF REVIEW**

In reviewing a trial court's grant of a motion for summary judgment, this court must determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000). Our inquiry involves only a question of law with no presumption of correctness attached to the trial court's judgment. *Id.* Under Tenn.

R. Civ. P. 56.04, “[s]ummary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.” *Hannan v. Alltel Publ’g*, 270 S.W.3d 1, 5 (Tenn. 2008) (citing Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993)). In Tennessee, the moving party who does not bear the burden of proof at trial must either

- (1) affirmatively negate an essential element of the nonmoving party’s claim; or
- (2) show that the nonmoving party cannot prove an essential element of the claim at trial.

*Hannan*, 270 S.W.3d at 9. A “conclusory assertion” is not enough to shift the burden. *Id.* at 5 (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). It is also not enough for the moving party to “cast doubt on a party’s ability to prove an element at trial.” *Hannan*, 270 S.W.3d at 8.

However, if the moving party is able to affirmatively negate an essential element or show that the nonmoving party would be unable to prove an essential element, “the burden of production shifts to the nonmoving party to show that a genuine issue of material fact exists.” *Id.* at 5; *see also Sykes v. Chattanooga Hous. Auth.*, No. E2008-00525-COA-R3-CV, 2009 WL 2365705, at \*2-3 (Tenn. Ct. App. E.S., July 31, 2009). Thus, if ACN can either affirmatively negate an essential element of Mr. Burnett’s retaliatory discharge claim or show that Mr. Burnett cannot prove an essential element at trial, the burden shifts to Mr. Burnett to show that a genuine issue of material fact still exists regarding an essential element of his claim.

#### **IV. ANALYSIS**

##### **A. PROTECTION UNDER COMMON LAW RETALIATORY DISCHARGE AND TENNESSEE WHISTLEBLOWER ACT CAUSES OF ACTION**

Tennessee courts have long recognized the employment-at-will doctrine for employment relationships that do not fall within term contracts. *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002). Generally, under this doctrine, either the employer or the employee can terminate the relationship “at any time for good cause, bad cause, or no cause.” *Id.* (quoting *Sullivan v. Baptist Mem’l Hosp.*, 995 S.W.2d 569, 574 (Tenn. 1999)). The Tennessee Supreme Court first recognized a claim for retaliatory discharge as an exception to the employment-at-will doctrine in *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984) (recognizing action where plaintiff/employee had been

discharged for pursuing workers' compensation benefits). Four years later in *Chism v. Mid-South Milling Co.*, 62 S.W.2d 552 (Tenn. 1988), the Court first recognized a "whistleblowing" cause of action when the "at-will plaintiff-employee is discharged for refusing to remain silent about illegal activities." See *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002) (citing *Chism*, 62 S.W.2d at 556). The common law claim of retaliatory discharge now encompasses a more general public policy exception that "an at-will employee 'generally may not be discharged for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision.'" *Crews*, 78 S.W.3d at 858 (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716-17 (Tenn. 1997)).

To recover on a common law claim of retaliatory discharge in Tennessee, a plaintiff-employee must show:

- (1) that an employment-at-will relationship existed;
- (2) that the employee was discharged;
- (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and
- (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.

*Crews*, 78 S.W.3d at 862 (internal citations omitted); see *Franklin v. Swift Transp. Co.*, 210 S.W.3d 521, 528 (Tenn. Ct. App. 2006).

The Tennessee Public Protection Act, informally referred to as the "Tennessee Whistleblower Act," was enacted in 1990 to "protect employees from being discharged in retaliation for 'blowing the whistle' on infractions of rules, regulations, or the law pertaining to the health, safety, and general welfare of the public." *Guy*, 79 S.W.3d at 535. Under the Act, "[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities." Tenn. Code Ann. § 50-1-304(b) (Supp. 2009). The Act defines "illegal activities" as those "that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety, or welfare." Tenn. Code Ann. § 50-1-304(a)(3). An employee terminated in violation of subsection (b) "shall have a cause of action against the employer for retaliatory discharge . . . ." *Id.* § (d). A plaintiff-employee must establish the following four elements to prevail on a statutory claim for retaliatory discharge:



- (1) the plaintiff's status as an employee of the defendant;
- (2) the plaintiff's refusal to participate in, or to remain silent about, "illegal activities" as defined under the Act;
- (3) the employer's discharge of the employee; [and]
- (4) an exclusive causal relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.

*Voss v. Shelter Mut. Ins. Co.*, 958 S.W.2d 342, 344 (Tenn. Ct. App. 1997) (quoting *Merryman v. Cent. Parking Sys., Inc.*, 1992 WL 330404 (Tenn. Ct. App. 1992)).

The Tennessee Supreme Court has held that the Tennessee Whistleblower Act is "cumulative to the common law cause of action for retaliatory discharge," meaning that a plaintiff-employee may bring simultaneous common law and statutory claims. *Guy*, 79 S.W.3d at 537. Under both causes of action, the plaintiff-employee must show that his whistleblowing action "serves a public purpose [that] should be protected." *Id.* at 538 n.4 (quoting *Wagner v. City of Globe*, 722 P.2d 250, 257 (Ariz. 1986)). "So long as employees' actions are not merely private or proprietary, but instead *seek to further the public good*, the decision to expose illegal or unsafe practices should be encouraged." *Id.* (quoting *Wagner*, 722 P.2d at 257) (emphasis added in *Guy*).

The trial court held that Mr. Burnett's complaints did not bring him under the protection of either the common law or statutory causes of action for retaliatory discharge because they "did not raise matters of public concern important to the public health, safety or welfare." Tennessee courts have held that in addition to being against the criminal or civil code, the alleged "'illegal activity' or violation by the employer must implicate important public policy concerns as well." *Franklin*, 210 S.W.3d at 530; *see also Guy*, 79 S.W.3d at 538.

Mr. Burnett presented affidavits of four current or former ACN employees in support of the allegation that Mr. Kinzalow used ACN employee time and materials for the benefit of ACN officers and supervisors, as well as some family members of ACN officers and supervisors. Where Mr. Burnett's argument fails is in his assertion that Mr. Kinzalow's actions, if proven, would constitute an illegal activity that would implicate public policy concerns. ACN argues that "[a]t worst, Burnett 'blew the whistle' on an internal management issue, not a matter of urgent public interest." We agree. The retaliatory discharge exception to the employment-at-will doctrine must be construed narrowly, "in limited circumstances, [where] certain well-defined, unambiguous principles of public policy confer upon employees implicit rights which must not be circumscribed or chilled by the potential of termination." *Franklin*, 210 S.W.3d at 530-31 (quoting *Stein v. Davidson Hotel*,

945 S.W.2d 714, 717 (Tenn. 1997)). The Tennessee Supreme Court noted the following examples of cases in which an illegal activity has been held to implicate a public policy concern:

These examples included cases in which the employee was discharged for refusing to commit perjury, for insisting on obeying a lawful subpoena, for refusing to seek to be excused from jury duty, for refusing to falsely certify the required testing of consumer products, and for reporting consumer fraud violations.

*Franklin*, 210 S.W.3d at 527 (citing *Chism*, 762 S.W.2d at 554 with approval). Tennessee courts have also found public policy to be implicated when an employee reported potentially life-threatening conditions in a hotel laundry room, *Mason v. Seaton*, 942 S.W.2d 470, 472 (Tenn. 1997); when an employee was discharged after filing a workers' compensation claim, *Kinsler v. Berkline*, 2008 WL 4735310 (Tenn. Ct. App. Oct. 27, 2008) (*permission to appeal granted* Apr. 27, 2009); and when an employee reported alleged sexual harassment, *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d 364, 377 (Tenn. Ct. App. 2005).

In contrast, we have held that a complaint regarding an alleged technical violation of a regulation and a complaint regarding an internal management issue are not protected by the Tennessee Whistleblower Act. *See Franklin*, 210 S.W.3d at 532 (“Finding that *any* regulatory infraction by an employer, no matter how minor, can support a claim of retaliatory discharge would be a clear extension of the law, well beyond the boundaries of any prior Tennessee decision.”); *Voss*, 958 S.W.2d at 345-46 (holding that an employee’s report of allegedly unwarranted insurance rate hikes and management concerns did not rise to the level of illegal activities under Tenn. Code Ann. § 50-1-304). Use of company materials and time is primarily an internal management issue, with dangers from misuse confined to company profits and efficiency.<sup>1</sup> Mr. Burnett is correct in noting that the Tennessee Whistleblower Act applies to private companies, but it does so only when a matter of importance to the public health, safety or welfare is at stake. *See Franklin*, 210 S.W.3d at 531. Viewing Mr.

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<sup>1</sup>Mr. Burnett cites cases in which other states have applied their retaliatory discharge causes of action more broadly, particularly *Brenneke v. Dept. of Mo., Veterans of Foreign Wars of the United States*, 984 S.W.2d 134 (Mo. Ct. App. 1998), and *Belline v. K-Mart Corp.*, 940 F.2d 184 (7th Cir. 1991) (applying Illinois law). *Brenneke* is distinguishable from this case in that the court found a “strong mandate of Missouri public policy to prevent theft of *charitable donations to and funds of a non-profit organization*.” *Brenneke*, 984 S.W.2d at 139 (emphasis added). The facts in *Belline* are a somewhat closer match, but as Judge Easterbrook noted in his dissent, the Seventh Circuit there reversed a Northern District of Illinois decision that had applied current Illinois retaliatory discharge law. *Id.* at 190 (“No state case I could find says that Illinois wants to crack down on firms that do not pay adequate attention to their interest in curtailing pilfering by their own employees.”).

Burnett's claims in the most favorable light possible, use of company time and resources by a company employee for company employees and close relatives does not rise to the level of public concern necessitating protection under either the common law claim of retaliatory discharge or the Tennessee Whistleblower Act.

## **B. REASON FOR DISCHARGE**

Summary judgment for ACN is warranted because Mr. Burnett's allegations regarding his supervisor's use of company time and resources for non-work pursuits do not implicate a public policy concern under either the common law or statutory protection for retaliatory discharge claims. This holding pretermits all other issues raised on appeal, as Mr. Burnett cannot prove an essential element of his claims at trial. We therefore need not consider the issue of whether Mr. Burnett "failed to come forth with compelling circumstantial evidence from which a rational jury could conclude that ACN was motivated to discharge Burnett for any reason other than his insubordination."

## **V. CONCLUSION**

The trial court's order of summary judgment is affirmed. Costs on appeal are taxed to the appellant, Ambrose C. Burnett. The case is remanded, pursuant to applicable law, for collection of costs assessed below.

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JOHN W. McCLARTY, JUDGE